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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/849,509	05/19/2004	Laurence C. Mudge	0624-4129	6774
27123	7590	02/02/2006	EXAMINER	
MORGAN & FINNEGAN, L.L.P.			PRYOR, ALTON NATHANIEL	
3 WORLD FINANCIAL CENTER			ART UNIT	
NEW YORK, NY 10281-2101			PAPER NUMBER	

1616

DATE MAILED: 02/02/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

**Application No.**

10/849,509

**Applicant(s)**

MUDGE, LAURENCE C.

**Examiner**

Alton N. Pryor

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on 27 December 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☐ Claim(s) 1-8, 10-17, 20-35, 37 and 38 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) 1-8, 22 and 24-31 is/are allowed.
- 6) ☐ Claim(s) 10-17, 20, 21, 23, 32-35, 37, 38 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

Applicant's arguments, see paper, filed 12/27/05, with respect to the rejection(s) of claim(s) 10-17,20,21,23,32-35,37,38 under 35 USC 103(a) have been fully considered and are persuasive. Therefore, the rejection has been withdrawn.

Objection to claim 19 is withdrawn. The limitation of claim 19 has been included in claims 10 and 32, which are now cited in the 103(a) rejection below. However, upon further consideration, a new ground(s) of rejection is made in view of argument below.

Applicant 1) argues that nothing in Hoechst's suggest that a phthalocyanine is an active component with the fungicide in Fenn et al and 2) has amended claims 10 and 32 to employ the linking term "consisting essentially of". Examiner argues 1) both Fenn and Hoechst disclose fungicidal composition which is ample motivation for the combination (It obvious to combine references having the same utility); 2) applicant provides no data showing that phthalocyanine is an active component when combine with Fenn's fungicide; applicant does not show how phthalocyanine enhances the activity of Fenn's fungicide; 3) "consisting essentially of" language is read as "comprising" unless applicant show that the other components presence as the result of combining Hoechst and Fenn do materially effect the instant invention. For these reasons, the previous 103(a) made on 7/26/05 is maintained.

With respect to declarations showing unexpected results for instant combination comprising fosetyl-Al (instant compound of formula I) plus a phthalocyanine compound, Applicant provides results for the combination wherein mancozeb is part of the combination. This combination is synergistic. However, Examiner argues that all of the

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examples showing synergism provided by Applicant include mancozeb (a fungicide).

Examiner argues that Applicant provides no examples of synergism for a combination comprising only phosphorous acid or fosetyl-Al plus a phthalocyanine lacking a fungicide (mancozeb). For this reason the 35 USC 103(a) rejection is proper.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 10-17,20,21,23,32-35,37,38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hoechst (DE 2412324; 9/25/75) in view of Fenn et al (Phytopathology, 74 (5), pp. 606-611). Hoechst teaches a fungicidal aqueous dispersion (suspension) composition comprising 0.1-3 wt % phthalocyanine. See abstract. Hoechst does not teach the composition comprising phosphorous acid or aluminum ethyl phosphite (fosetyl-Al). However, Fenn teaches a fungicidal composition comprising phosphorous acid or fosetyl-Al. See abstract. It would have been obvious to modify the composition taught by Hoechst to include the phosphorous acid or fosetyl-Al taught by Fenn. One would have been motivated to do this since both references individually teach fungicidal compositions. The references do not disclose the instantly named phthalocyanine compounds such as pigment blue 15 or the instant amounts of phosphorous acid or fosetyl-Al. It would have been obvious to one having ordinary skill in the art to employ pigment blue 15. One would have been motivated to do this since

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pigment blue 15 is a species in the phthalocyanine compound genus. Species within the same genus would have been expected to possess the same or similar chemical and physical properties and therefore, exhibit similar results when employed in a method of application. With respect to the instant amount of fosetyl-Al or phosphorous acid, one having ordinary skill in the art would have been expected to determine the optimum amount of fosetyl-Al or phosphorous acid. One would have been motivated to do this in order to make a composition that would have been most effective in controlling fungal growth.

***Other Matters / Allowable Subject Matter***

Claim 9 is now properly canceled. Claims 1-8,22,24-31 are allowable. The prior does not teach or suggest a method of applying the instant fungicidal composition onto turf grass.

***Telephonic Inquiry***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Alton N. Pryor whose telephone number is 571-272-0621. The examiner can normally be reached on 8:00 a.m. - 4:30 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan can be reached on 571-272-0629. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

A handwritten signature in black ink, appearing to read 'Alton Pryor', is positioned above the printed name.

Alton Pryor  
Primary Examiner  
AU 1616